Supreme Court, U.S.
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No. 96-606

In The

Supreme Court of the United States

October Term, 1996

INDU CRAFT, INC.,

Petitioner,

v.

BANK OF BARODA and
KRISHNAKANT C. CHOKSHI,

Respondents.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

REPLY TO BRIEF IN OPPOSITION

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REASONS FOR GRANTING THE WRIT

I. This Court Should Review The Second Circuit's Extraordinary Expansion Of Its Reexamination Powers Under The Seventh Amendment

Petitioner argued that the Second Circuit departed from settled law in 3 major respects: (1) After finding the jury award "amply justified by the proof," P-14a, that Court refused to simply affirm the jury award as required by the Seventh Amendment, P-10;[1] (2) After explicitly reinstating the jury verdict, it reversed the jury's finding of no liability on the counterclaim, P-17a, 11; and (3) It refused to permit the jury decide the issue of punitive damages, P-12.

Respondents do not point to *any case* where *any court* did *any of the above*. Instead, they blithely assert that where both legal and equitable claims are involved, the court should decide the equitable claims after the jury decides the legal claims, R-5. They also claim that the issue of equitable setoff was not raised below, R-4.

Respondents' assertions are manifestly untenable, since *no* equitable claims were involved here. All claims and counterclaims were tried to, and decided by, the jury. That apart, the Second Circuit's decision – reducing a jury's damage award not for being excessive or otherwise violative of legal standards, *Gaspirini v. Center For Humanities, Inc.*, ___ U.S. ___, ___, 116 S.Ct. 2211, 2217 (1996), but for hitherto undiscovered "equitable" reasons – is unprecedented. Given these exceptional circumstances, the writ should be granted.

A. The Second Circuit's Reduction Of The Jury Award Was A Novel Extension Of Its Re-Examination Powers

Respondents do not even cite, let alone discuss, *Gaspirini*, 116 S.Ct. 2211 – which directly contradicts the decision at bar, P-9, 10, 11, 14-15! Instead, they argue that restitution/disgorgement

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[1] "P-" and "R-" refer to the Indu Craft's Petition dated October 9, 1996, and the Bank's "Brief in Opposition To Petition For Writ Of Certiorari" dated November 18, 1996.

actions are equitable which must be decided by the judge after the jury verdict and hence, the setoff was proper, *id.*

No restitution or disgorgement claims were at issue here. Indeed, respondents did not even *seek* an equitable setoff. *What they sought was reversal of the jury verdict on their counterclaims, which the Second Circuit granted,* P-17a. Hence, restitution and disgorgement cases, R-5, are irrelevant.

In any event, "Only one trier of fact should be used for the trial of what is essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments." *Fitzgerald v. United States Lines Company,* 374 U.S. 16, 20, *reh'g den.*, 375 U.S. 870 (1963). *Accord, Chauffers, Teamsters & Helpers, Local No. 391 v. Terry,* 494 U.S. 558, 579 (1990) ("in mixed cases, . . . jury trial must precede a decision on the equitable claims – with the attendant collateral-estoppel effects," per Brennan, J. (concurring), *citing Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959)).

Cases cited by respondents, R-5, merely reiterate this,[2] or involved the "trial by jury" clause of the Seventh Amendment,[3] not the reexamination clause at issue, *Gaspirini,* 116 S.Ct. at 2222.

B. This Court Ought To Consider The Important Constitutional Questions Concerning Federal Courts' Power

Respondents' contention that the Seventh Amendment issue arising from the Second Circuit's award of equitable setoff "was never raised or considered below," R-4, is disingenuous. *The issue of equitable setoff was not before the Second Circuit*; that Circuit spontaneously invoked the theory for reducing the jury award. Petitioner had no chance of raising this issue.

In any event, this tremendously significant constitutional issue ought to be decided by this Court. *Glidden Co. v. Zdonak,* 370 U.S.

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[2] *See, e.g., Dairy Queen, Inc. v. Wood,* 369 U.S. 469 (1962) (Claim for equitable accounting could not negate jury trial on contract claims subsumed within accounting claim).

[3] *See, e.g., Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33 (1989); *Tull v. United States,* 481 U.S. 412 (1987).

530, 536, *reh'g den.*, 371 U.S. 854 (1962) (constitutional grounds considered for first time); *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 230-31 (1990) "federal courts are under independent obligation to examine their own jurisdiction . . . "). The lower courts have made all factual findings necessary and only a legal question is presented. P-20 n.6; *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 697-98 (1984). *Hormel v. Helvering,* 312 U.S. 552, 557 (1941) ("Orderly rules of procedure do not require sacrifice of the rules of fundamental justice").

Indeed, this Court has even considered issues which were *never* raised where, as here, lower courts' actions were "fraught with potential prejudice". *Rogers v. United States,* 422 U.S. 35, 41 (1975); *see also Lebron v. National Railroad Passenger Corp.,* 115 S.Ct. 961, 962 (1995) (constitutional argument disavowed below, not raised in cert. petition, considered for first time on merits); *City of Houston v. Hill,* 482 U.S. 451, 467, *app. dis., cert. den.,* 483 U.S. 1001 (1987).

Thus, this case presents the exceptional circumstance of a federal appeals court acting contrary to well-established law, *Atlantic & Gulf Stevedores v. Ellerman Lines, Limited,* 369 U.S. 355, 359, *reh'g den.,* 369 U.S. 882 (1962) ("neither we nor the Court of appeals can redetermine facts found by the jury any more than the District can predetermine them. For the Seventh Amendment says, . . . ") – and that too without notice. *None of the cases cited by respondents, R-4, involved such a situation.* Hence, this Court's consideration of the issue is clearly proper.

II. Whether Postjudgment Interest In A Diversity Case Should be Governed by State Law Under *Erie* Is An Important Question Warranting Consideration

A. Applying Federal Law Violates the *Erie* Doctrine Since It Will Result In Significant Differences In Recovery, And Lead To Forum Shopping

The *Erie* doctrine precludes " 'substantial variations' between state and federal money judgments," P-14, *quoting Gaspirini,* 116 S.Ct. at 2221, and requires federal courts to respect States' dominant interest in prescribing postjudgment interest, long considered as item of substantive State law, P-15. Since State and federal

interest rates are different (often significantly[4]), diversity courts' application of 1961 also encourages forum shopping, P-15-17.

Respondents contend that postjudgment interest may be considered "procedural," and hence Section 1961 is within Congress' legislative power, R-9. No forum-shopping will occur, they say, since the federal rate is variable and litigants could not predict the rate applicable to specific cases, R-9. They also suggest that no conflict exists on this issue.[5]

Respondents are clearly wrong. First, applying 1961 to diversity cases inevitably results in *differences proscribed under Erie*: Here, the difference is already over $350,000.[6] *See also DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.*, 997 F.2d 1340, 1342 (11th Cir.), *cert. denied*, 510 U.S. 1012 (1993), ("benefit worth roughly $1.5 million"). Such dramatic differences in the amount of recovery can be considered "procedural" only in a metaphysical sense.

Second, given the state/federal interest differential, forum shopping is ineluctable. The federal rate moves slowly; it has not exceeded the New York rate since May 1989! Many cases do *not* involve complex factual issues and permit early adjudication (often through summary judgment). In such cases, the litigant can easily predict whether the federal or state rate would be more favorable. Obviously, this makes forum shopping inevitable. Federal courts themselves have repeatedly recognized that the federal interest rate is too low, because there is no default risk with Treasury bills. *Gorenstein Enterprises, Inc. v. Quality-Care U.S.A., Inc.*, 874 F.2d

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[4] For example, here, the rates are 9% under the New York law and 3.41% under federal law.

[5] The Court ought to consider this issue since the interests of judicial administration will be served by addressing this important and recurring issue, *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980), *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 (1981), although it was not raised below in this form. *Anderson v. United States*, 417 U.S. 211, 223 (1974) (where the "substance of the present contentions" were raised below, and argument had "serious constitutional overtones").

[6] Being the interest differential at 5.59% (New York rate of 9% less federal rate of 3.41%) on the judgment amount of $2,268,865.43 for 3 years.

431, 437 (7th Cir. 1989). *Accord, American Telephone And Telegraph Company, v. United Computer Systems, Inc.*, 98 F.3d 1206, 1208 (9th Cir. Oct. 30, 1996) ("*AT&T*"); *Indu Craft*, P-44a.

B. Section 1961 Should Be Interpreted (As It Had Been, Prior To The 1982 Amendment) Consistent With The *Erie* Doctrine To Exclude Diversity Cases

Respondents offer no answer to the important issue of statutory interpretation that needs to be settled by this Court. As we pointed out earlier, P-17-20, the lower courts' interpretation of 1961 was manifestly contrary to well-settled precedent: Prior to the 1982 amendment, Section 1961 had never been applied to diversity cases, and *no* evidence existed of Congressional intention to change this interpretation. *Freedline v. Luxemburg*, 682 F.Supp. 311, 312 (M.D. La. 1988) ("The amendment made not one change in the operative language . . . "); *Lazzara v. Esser*, 622 F.Supp. 48, 50 (N.D. Ill. 1985), *aff'd in part*, 802 F.2d 260 (7th Cir. 1986) ("This Court cannot conceive that Congress, which has long been considering abolishing diversity jurisdiction altogether because of the ever-increasing federal caseload, would have adopted a federal interest statute applicable in diversity cases which would increase rather than decrease the number of federal cases without mentioning one word about its applicability to diversity cases in the legislative history"). Moreover, not applying 1961 to diversity cases also avoids the Constitutional issue of Congressional power over a state subject, P-17-20.

Respondents confirm that Section 1961 has been applied to diversity cases only after the 1982 amendment, R-7. Hence, this issue should be considered. *United States v. Speers*, 382 U.S. 266, 277 n.22 (1965) (argument relevant to statutory construction considered although not raised below).

III. The Conflict Between the Circuits With Respect To The Commencement Of Postjudgment Interest Under *Kaiser* Should Be Resolved

"The circuits differ over when postjudgment interest attaches if the appellate court vacates a judgment for the

plaintiff and the plaintiff then wins a second judgment in the district court." *Biscayne Oil & Gas, Inc., v. Burdette Oil & Gas Company, Inc.,* 1991 WL 224261 at *4 (4th Cir. Apr. 10, 1991) (unpublished disposition); *Boyd v. Bullala,* 751 F.Supp. 576, 581-82 (W.D.Va. 1990).

Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990), permitted, but did not require, 1961 interest to accrue from the first judgment. *Kaiser,* 494 U.S. at 870 (per White J., and four other Justices, Dissenting). Accordingly, some Circuits chose the earlier judgment for 1961 purposes: Third,[7] Eighth,[8] First,[9] and Eleventh.[10] But – other than the Second Circuit here – *these decisions have uniformly relied upon 1961's underlying purpose of compensating the prevailing party for loss of use of the money.*[11]

Other Circuits however, ignored the compensatory purpose and chose the later judgment: Sixth,[12]

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[7] *Dunn v. Hovic,* 13 F.3d 58 (3d Cir.), *cert. denied,* 510 U.S. 1031 (1993); *Loughman v. Consolidated-Pennsylvania Coal Co.,* 6 F.3d 88 (3d Cir. 1993).

[8] *H.J., Inc. v. Flygt Corp.,* 925 F.2d 257 (9th Cir. 1991).

[9] *Cordero v. Mendez,* 922 F.2d 11 (1st Cir. 1990).

[10] *DeLong,* 997 F.2d 1340.

[11] *Dunn,* 13 F.3d at 61 ("We see no reason why Dunn should be disadvantaged in the calculation of interest because the jury overestimated his damages."); *Cordero,* 922 F.2d at 18 ("Calculating interest from the date of the second judgment would penalize appellees for the trial judge's error"); *Loughman,* 6 F.3d at 97 ("the purpose of 28 U.S.C. §1961 'is to compensate the successful plaintiffs for being deprived of compensation for the loss . . . '," *quoting Kaiser,* 494 U.S. at 835-36); *DeLong,* 997 F.2d at 1342 (Washington Mills (losing party) "would receive a windfall if it were not to pay Delong for the use of the funds for this time . . . that the district court erroneously set aside the earlier judgment should not result in a transfer of wealth from Washington Mills to its victim, DeLong.").

[12] *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.,* 917 F.2d 1413 (6th Cir. 1990), *cert. denied,* 502 U.S. 899 (1991), and *cert. denied,* 502 U.S. 808 (1991); *Adkins v. Asbestos Corp.,* 18 F.3d 1349, 1351 (6th Cir. 1994).

Tenth,[13] and Ninth.[14] As illustrated below, these cases cannot be reconciled – despite respondents' Herculean efforts, R-10-14.

For example, in *Andrulonis v. United States,* 26 F.3d 1224, 1233 (2nd Cir. 1994), the first judgment was for $5,978,409 against the government and the NYSDOH. *Andrulonis v. United States,* 924 F.2d 1210 (2nd Cir. 1991), *on recon.,* 952 F.2d 652 (1991), *cert. denied,* 505 U.S. 1204 (1992). The Second Circuit partially reversed, and remanded for recalculation of the setoff due under New York law for amounts received from other settling defendants. 924 F.2d at 1227. The parties settled for $5,357,240.00, and litigated on 1961 interest. 26 F.3d 1224. The Second Circuit held that while NYSDOH's percentage of liability for contribution was ascertained by the first judgment, "the dollar amount of damages to which the Government was entitled was not" and 1961 interest accrued from the later judgment. 26 F.3d at 1234. However, in *Cordero,* 922 F.2d 11, where the first judgment of $616,717 was vacated, 867 F.2d 1 (1st Cir. 1989), and, upon retrial, substituted with an award of $307,239.31, the First Circuit awarded 1961 interest from the first judgment. And in *Louisiana Power and Light Co. v. Kellstrom,* 50 F.3d 319, 332 (5th Cir.), *cert. denied,* 116 S.Ct. 173 (1995), the Fifth Circuit awarded 1961 interest on an attorney's fee award from the date of the first judgment on the merits – *a date when the fee award had not even been quantified.* While doing so, the *Fifth Circuit cited the Eighth Circuit*[15] *as being in agreement, and readily acknowledged the conflict with the Seventh and Tenth Circuits,*[16] 50 F.3d at 332.

Moreover, since the filing of this Petition, the Ninth Circuit has decided the issue in direct conflict with the Second Circuit's

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[13] *Wheeler v. John Deere Co.,* 935 F.2d 1090 (10th Cir. 1991).

[14] *AT&T,* 98 F.3d 1206.

[15] *Jenkins v. Missouri,* 931 F.2d 1273, 1276-77 (8th Cir.), *cert. denied,* 502 U.S. 925 (1991).

[16] *MidAmerica Fed. Sav. & Loan Ass'n v. Shearson/American Express, Inc.,* 962 F.2d 1470, 1476 (10th Cir. 1992) (stating that "[k]ey to the *Kaiser* holding is the date damages are 'ascertained' in a meaningful way"); *Fleming v. County of Kane,* 898 F.2d 553 (7th Cir. 1990) (awarding interest from date of award of fees).

decision here. In *AT&T,* 98 F.3d 1206, the trial court first confirmed an arbitration award against AT&T; the Ninth Circuit reversed and remanded. The trial court then vacated the award, and the Ninth Circuit reversed and confirmed the award. California's prejudgment interest rate being higher than the 1961 interest rate, AT&T, the losing party, sought accrual of 1961 interest from the first judgment. It argued – like the instant respondents – that under *Kaiser,* 1961 interest "must be calculated from the first judgment in which damages are sufficiently ascertained, regardless of any subsequent events, and regardless of any equitable considerations." 98 F.3d at 1210.

The Ninth Circuit disagreed, observing that *Kaiser* and its progeny never held that "interest must be calculated from the entry date of the first judgment ascertaining damages." 98 F.3d at 1210. Moreover, *all* the precedents (which included those cited by respondents here) were distinguishable on the grounds that (a) no prejudgment interest was available, or (b) prejudgment interest rate was lower than the postjudgment interest rate, or (c) the issue was not raised. *Id.* at 1211. Hence, in those cases, accruing 1961 interest from the first judgment favored the prevailing party. *Id.*

Faced with 2 judgments, "both of which sufficiently ascertain the damages," id., the Ninth Circuit held that 1961 interest accrued from the later judgment, not the earlier one, for two reasons. First, the earlier judgment was vacated at AT&T's request and rendered unenforceable until after remand. Second, prejudgment interest under California law more fully compensated the prevailing party. The Ninth Circuit explained:

> Where a prior judgment awarding damages has been vacated pursuant to the actions of an ultimately losing party, *equitable principles favor calculating the interest in a manner that more fully compensates the prevailing party. Any other result would penalize the prevailing party, and in certain circumstances might also encourage losing parties to instigate postjudgment litigation so they can reap the benefits of a low interest rate.* We see no inconsistency between this holding and the requirements of 28 U.S.C. § 1961 . . .

98 F.3d at 1211 (emphasis added).

This is patently contrary to the Second Circuit's ruling at issue, P-43a-46a. Earlier, in *Andrulonis,* 26 F.3d at 1233, the Second Circuit expressly disclaimed any "amorphous equitable power" for choosing the accrual date under 1961. Thus, the Second Circuit's pronouncements on the subject are indisputably in conflict with the Ninth Circuit's.

Thus, "this case presents a conflict among the Circuits over the proper application of an oft-used federal statute," *Chattem, Inc., v. Bailey,* 486 U.S. 1059 (1988) (per White, J., Dissenting). Accordingly, it is appropriate for this Court to resolve this conflict.

IV. This Court Should Consider The Question Whether The Appeals Court's Refusal to Consider Compounding of Interest Was An Abdication Of Its Responsibility Under Rule 37, Fed.R.App.P.

Petitioner argued that under New York law, interest is compounded where the defendant has acted in bad faith. Thus, the interest award here should have been compounded in view of the jury's finding of respondents' malevolence. P-27. And since Rule 37, Fed. R. App. P., "gives *appellate* courts discretion to decide the issue on a case by case basis," *Smith v. National R.R. Passenger Corp.,* 856 F.2d 467, 473 (2nd Cir. 1988) (emphasis added); *accord, DeLong,* 997 F.2d at 1342 (same), petitioner's failure to raise the issue before the trial court was not preclusive, P-27-28.

Respondents' feeble answer is that since the Second Circuit refused to address the issue, so should this Court.

This begs the issue, which is whether the Circuit's refusal is an abdication of its statutory responsibility under Rule 37. *Cfr., Leroy v. City of Houston,* 906 F.2d 1068 (5th Cir. 1990) (Court of Appeals may sua sponte recall mandate regarding interest). This question is of recurrent significance and ought to be addressed by this Court.

V. The Lower Courts' Decision To Withhold The Issue Of Punitive Damages From The Jury Was In Conflict With Relevant Decisions From Other Circuits And This Court

The trial court submitted Indu Craft's *Prima Facie* Tort claim to the jury Nevertheless, it refused to give the profferred instructions on punitive damages to the jury. The Second Circuit affirmed; but neither court said *anything* about punitive damages. P-28. Thus, respondents' suggestion that the lower courts dismissed the punitive damages claim "as a matter of law," R-15, is untenable, the unfairness of such an implicit ruling being only heightened by the jury's express finding of respondents' malice and bad faith.

As pointed out earlier, P-28, the lower courts' refusal to let the jury decide this issue was in conflict with relevant decisions of federal and state courts. It is well-settled that "It is not the form of the action that gives the right to the jury to give punitive damages, but the moral culpability of the defendant." *Walker v. Sheldon,* 10 N.Y.2d 401, 404-05 (N.Y. 1961). The moral culpability of respondents being clear, the jury should have been given the right to award punitive damages. *See also Hughes v. Patrolmen's Benevolent Ass'n,* 850 F.2d 876 (2d Cir. 1988), *cert. denied,* 488 U.S. 967 (1988) (upholding punitive damages award in case involving personal vendetta). This Court ought to review the issue.

CONCLUSION

The Writ ought to be granted, the above issues considered in depth after full briefing, the jury verdict reinstated in full, prejudgment interest compounded, and the case remanded for recalculation of postjudgment interest and a jury trial on punitive damages.

Respectfully submitted,

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Dated: New York, NY
November 25, 1996